# Petition

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No. ...
IN THE

# Supreme Court of the United States

October Term 1981

HUNTINGTON MEMORIAL HOSPITAL,

*Petitioner,*

*vs.*

VICTORIA MISSIRLIAN,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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## Question Presented.

Whether a Title VII plaintiff is required to file a complaint in federal court within ninety days after receipt of a determination by the Equal Employment Opportunity Commission finding no merit to the plaintiff's charge, notifying the plaintiff of the conclusion of the EEOC's processing of the charge, and notifying the plaintiff of the right to institute a private civil suit, when the EEOC does not decide to reconsider the matter until six months after its original determination.

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IN THE

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October Term, 1981

HUNTINGTON MEMORIAL HOSPITAL,

*Petitioner,*

*vs.*

VICTORIA MISSIRLIAN,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner Huntington Memorial Hospital prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on November 4, 1981.*

### Opinions Below.

The opinion of the Court of Appeals, reported at 662 F.2d 546 (9th Cir. 1981), is set forth herein as Appendix A. The opinion of the United States District Court for the Central District of California has not been reported and is

*The Petitioner's full name is the Collis P. and Howard Huntington Memorial Hospital which is owned and operated by the Pasadena Hospital Association, Ltd., a California non-profit corporation.

set forth herein as Appendix B. The EEOC's original Letter of Determination and Attachment is set forth herein as Appendix C.

**Jurisdiction.**

The judgment of the Court of Appeals, reversing the District Court's judgment dated February 27, 1979 in favor of the petitioner, was entered on November 4, 1981. This petition for writ of certiorari was timely filed within ninety days therefrom, pursuant to Supreme Court Rule 20.2. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

**Statutory Provisions Involved.**

Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b), provides in pertinent part:

> If the Commission determines after . . . investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action.

Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1), provides in pertinent part:

> If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case in-

> volving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge.

**Statement of Case.**

Respondent Victoria Missirlian filed a charge with the Equal Employment Opportunity Commission ("EEOC") on August 5, 1974, alleging that Petitioner Huntington Memorial Hospital (the "Hospital"), discriminated against her on account of her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. On June 3, 1975, the EEOC issued a Letter of Determination pursuant to 29 C.F.R. § 1601.19b(d), finding that there was no reasonable cause to believe any of her allegations. App. C. The determination concluded:

> This determination concludes the Commission's processing of the subject charge. Should the Charging Party wish to pursue this matter further, she may do so by filing a private action in Federal District Court. (A separate attachment is enclosed to Charging Party with information regarding the procedure.) App. C-5.

The separate attachment repeated that the EEOC's processing of the charge was concluded and informed Missirlian that she could request a 90-day Notice of Right to Sue by telephoning the EEOC. App. C-6. Missirlian did not do this. Instead she consulted with an attorney and sought EEOC reconsideration of her case.* App. A-2. She decided

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*As noted by the Ninth Circuit, App. A-2, n.2, Missirlian had no formal right to request a reconsideration. EEOC regulations provide that a determination of dismissal is final when issued and that requests for reconsideration will not be granted. The EEOC, may, however, reconsider its determination on its own motion. 29 C.F.R. § 1601.19b(d) (1975) (amended version at 29 C.F.R. §§ 1601.19(g)-.21(d) (1980).

not to sue on the advice of her attorney due to the costs she would incur. App. B-2.

Six months after its original determination, the EEOC notified the parties that it intended to reconsider its determination. On May 28, 1976, the EEOC issued a revised determination, now finding that the Hospital had violated Title VII. The EEOC notified Missirlian on August 17, 1978 that its conciliation efforts had failed and sent her a Notice of Right to Sue. On November 7, 1978, Missirlian filed suit in federal court. App. A-3, B-3 and B-4. Jurisdiction in the district court was invoked pursuant to 28 U.S.C. §§ 1331, 1343 and 2201.

The district court dismissed the complaint upon the Hospital's motion for summary judgment on the grounds that (1) Section 706(f)(1) requires a Title VII plaintiff to file a complaint in federal court within ninety days of receiving notification from the EEOC either that the administrative processing of the charge is complete or that the plaintiff has a right to sue; (2) the initial determination dismissing plaintiff's charge constituted effective statutory notice of her right to sue and thus plaintiff was required to file a complaint in federal court within ninety days of receipt thereof; and (3) the EEOC's revised determination was a legal nullity due to the expiration of the ninety day period. App. B. The Ninth Circuit reversed, holding that the original determination and accompanying letter did not trigger the statutory ninety day period because it did not provide a clear indication of when the ninety day period for filing a suit in federal court commenced. App. A-7.

**Reasons for Granting the Petition.**

The decision of the Ninth Circuit Court of Appeals is in direct conflict with the decision of the Eighth Circuit Court of Appeals in *Shea v. City of St. Paul*, 601 F.2d 345 (8th

Cir. 1979), the Third Circuit Court of Appeals in *Wilson v. Sharon Steel Corp.*, 549 F.2d 276 (3rd Cir. 1977) and the Second Circuit Court of Appeals in *De Matteis v. Eastman Kodak Co.*, 511 F.2d 306, *modified*, 520 F.2d 409 (2d Cir. 1975), on a fundamental jurisdictional issue of Title VII law: What notice from the EEOC triggers the ninety day period within which a private plaintiff must sue in federal court.

In *Shea*, the Eighth Circuit followed the rule set forth by the Second Circuit in *De Matteis v. Eastman Kodak Co.*, 511 F.2d 306, *modified*, 520 F.2d 409 (2d Cir. 1975), in holding that under § 706(f)(1) of Title VII, the EEOC's notice that a charge has been dismissed begins the running of the ninety day period immediately. 601 F.2d at 349. The Third Circuit also has stated that a determination of no probable cause is a dismissal triggering the ninety day period. *Wilson v. Sharon Steel Corp.*, 549 F.2d 276, 280 n.8 (3rd Cir. 1977).

The *Shea-Wilson-DeMatteis* rule is required by the express terms of Section 706. Section 706(b) requires that the EEOC notify an aggrieved party of dismissal of a charge upon a determination of no reasonable cause. Section 706(f)(1) repeats the notice requirement and mandates that a private civil action be filed within the ninety day period following notice of administrative dismissal.

In *Shea*, the Eighth Circuit interpreted the statutory notice provisions as requiring the EEOC to issue notice of its action, regardless of a demand from the complainant, upon a dismissal of the charge and following a determination by the EEOC that it would not file a civil action. 601 F.2d at 348. The Eighth Circuit found that "statutory notice under Section 706(f)(1) triggers the ninety day period if it conveys knowledge 'that the administrative procedures of the EEOC had terminated and that [the complainant] could not hope

to receive any further administrative assistance from the EEOC.' " 601 F.2d at 350, citing *Lacy v. Chrysler Corp.*, 533 F.2d 353, 360 (8th Cir.), *cert. denied*, 429 U.S. 959 (1976).

The facts in *Shea* are substantially identical to those here. The *Shea* plaintiff received a no reasonable cause determination, followed by a denial of reconsideration fewer than three months later. Both communications advised the plaintiff of her right to sue in federal court, though both letters erroneously indicated that a "Right-To-Sue Letter" was a predicate to suit as did the notice received by respondent Missirlian in the instant case. The Eighth Circuit concluded, however, that the notice provided to Shea "clearly satisfied" the statutory notice standard, notwithstanding the fact that the plaintiff "was not specifically apprised that any court action would have to be brought within 90 days of the dismissal of her charge." 601 F.2d at 349, 350. The court found that the complaint, which was filed within ninety days of receipt of a Notice of Right to Sue letter but 169 days after effective notice of dismissal of her charge, was not filed within the statutory period and the district court thus was without jurisdiction. 601 F.2d at 349-50.

To the extent that this case differs from *Shea*, this case calls more clearly for the Eighth Circuit rule. Respondent Missirlian made an informed decision on advice of counsel to forego her right to sue after receiving her no reasonable cause determination. App. A-2, App. B-2. Moreover, the EEOC waited six months to decide to reconsider, App. A-3, App. B-3, compared to the prompt denial of Shea's request for reconsideration, which occurred well within ninety days of the original determination. 601 F.2d at 347, 350.

Notwithstanding the Eighth Circuit's decision in *Shea*, the Ninth Circuit expressly rejected the Eighth Circuit's

holding, App. A-6, and added a nonstatutory requirement: that a Title VII plaintiff whose claim had been dismissed must be notified not only of that fact, but also precisely when the ninety days limitation period begins to run. App. A-7. This express rejection has disturbed a previously uniform rule governing the adequacy of statutory notice following administrative dismissal of charges. The Eighth, Third and Second Circuits have each correctly held that the ninety day statutory period begins to run upon notification that the charge has been dismissed. *Shea v. City of St. Paul*, 601 F.2d 345, 349 (8th Cir. 1979); *Wilson v. Sharon Steel Corp.*, 549 F.2d 276, 280 n.8 (3rd Cir. 1977); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 311, *modified*, 520 F.2d 409, 411 (2d Cir. 1975).

The Ninth Circuit's disagreement with the other Courts of Appeals that have addressed this issue was based upon its erroneous interpretation of the notice mandated by Section 706(f)(1). Although the court correctly noted that "[o]n its face, Title VII only requires the EEOC to notify the aggrieved party of the EEOC's decision to proceed no further," App. A-4, it ignored the express terms of the statute which require suit within ninety days after the aggrieved party has received notice that the EEOC processing of the charge has terminated.

The Eighth Circuit in *Shea* distinguished and rejected as controlling those cases supporting the proposition that notice of the failure of conciliation does not alone constitute adequate statutory notice. 601 F.2d at 349.* The distinction

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*See, e.g., *Lynn v. Western Gillette, Inc.*, 564 F.2d 1282 (9th Cir. 1977); *Page v. U.S. Industries, Inc.*, 556 F.2d 346 (5th Cir. 1977), *cert. denied*, 434 U.S. 1045 (1978); *Weaver v. Joseph Schlitz Brewing Co.*, 551 F.2d 122 (6th Cir. 1977); *McGuire v. Aluminum Co. of America*, 542 F.2d 43 (7th Cir. 1976); *Garner v. E.I. Du Pont de-Nemours & Co.*, 538 F.2d 611 (4th Cir. 1976); *Lacy v. Chrysler Corp.*, 533 F.2d 353 (8th Cir.), *cert. denied*, 429 U.S. 959 (1976); *Coles v. Penny*, 531 F.2d 609 (D.C. Cir. 1976); *Williams v. Southern Union Gas Co.*, 529 F.2d 483 (10th Cir.), *cert. denied*, 429 U.S. 959 (1976).

between cases of failure of conciliation and cases of dismissal is logical and persuasive. After failure of conciliation, both the EEOC and the charging party retain a statutory interest in the proceedings and the EEOC might lawfully take further action by filing suit. However, notice of administrative dismissal of a charge is actual and unambiguous notice that the EEOC has completed administrative proceedings and exhausted its authority to act. Notices were found to be deficient in conciliation failure cases because they did not inform the prospective plaintiff that his or her remedies through EEOC proceedings were exhausted, *see, e.g., Tuft v. McDonnell Douglas Corp.*, 517 F.2d 1301 (8th Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976), or that he or she had a right to sue in federal court, *see, e.g., Mahroom v. Hook*, 563 F.2d 1369 (9th Cir. 1977), *cert. denied*, 436 U.S. 904 (1978); *Gates v. Georgia Pacific Corp.*, 492 F.2d 292 (9th Cir. 1974), which is not true in the instant case. App. C-5 and C-6.

The Ninth Circuit squarely rejected the distinction between the two types of situations as set forth by the Eighth Circuit in *Shea*. In seeking statutory support for its rejection of the *Shea* rule, the Ninth Circuit stated that it found no "indication [in Sections 706(b) or 706(f)(1)] of a congressional purpose to provide less information about civil suit procedures" in cases of dismissal. App. A-6. In so doing, the court erroneously imposed on the statute a requirement that the notice contain explicit notice of the date on which the statutory period commences. App. A-7. This construction is neither supported by the statutory language nor consistent with the congressional policy underlying the ninety day statutory period. As stated by the Fifth Circuit, "[t]he statutory plan is to keep claims fresh" and the ninety day period "is a protection to the employer and is plainly there for its benefit alone." *Zambuto v. American Telephone &*

*Telegraph Co.*, 544 F.2d 1333, 1335 (5th Cir. 1977); *see also Delaware State College v. Ricks*, 449 U.S. 250, 256 (1980).

Section 706(f)(1) contains two relevant time constraints—the 180 day limitation for filing an initial charge with the EEOC and the ninety day period in which an aggrieved party must file a federal civil action. This Court has recognized the significance of the statutory limitations periods and has repeatedly addressed issues regarding Title VII time limitations for filing a charge with the EEOC.* Resolution of the question of the adequacy of notice in connection with the ninety day limit on the filing of a private civil action also is a matter of vital importance in the administration of Title VII.

Title VII litigation is taking up a substantial and ever-increasing percentage of judicial resources in already overburdened federal district courts. The substantive claims often involve complicated issues. Uncertainty as to what constitutes statutory notice triggering the limitation period in administrative dismissal cases causes lengthy procedural litigation. The instant case, in which the original dismissal of plaintiff's charge occurred over six and a half years ago, presents a compelling example of the need for this Court to decide what notice triggers the ninety day suit period following administrative dismissals of EEOC charges. Such would avoid the multiplicity of suits which will arise as a

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*In *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the Court determined what "alleged unlawful employment practice" was sufficient to begin the running of the limitations period in which a complaint with the EEOC must be filed under Section 706(e), 42 U.S.C. § 2000e-5(e). Similarly, in *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977), the Court examined whether an allegedly unlawful practice constituted a continuing violation of Title VII, stating that "the critical question is whether any present *violation* exists." 431 U.S. at 558. In *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980), the Court addressed the issue of timeliness of the initial filing with the EEOC in deferral states.

result of the square conflict among the Courts of Appeals caused by the decision of the Ninth Circuit.

The Ninth Circuit stated, App. A-4, n.3, that its decision will affect only disputes arising under the EEOC's former two-tier notice system in which the EEOC notified the parties of failure of conciliation or administrative dismissal, but sent a separate, subsequent letter upon request informing the aggrieved party of the right to bring a private suit. *See* 29 C.F.R. § 1601.25(a)(3) (1975) (amended version at 29 C.F.R. § 1601.28 (1980). However, the current regulations, 29 C.F.R. § 1601.28(b) (1980), are subject to change.* The EEOC has routinely modified and amended its procedural regulations, often as a result of judicial decisions. *See, e.g.*, 45 Fed. Reg. 48614 (1980) (EEOC statement that the change in the regulations for the processing of dismissals of Title VII charges is prompted by *Shea v. City of St. Paul*). A definite statement by this Court concerning what notice is sufficient to begin the running of the ninety day period would dispel the uncertainty surrounding this issue because the EEOC would be required to follow this standard in all pertinent regulations promulgated in the future and in the application of its current regulations.

Furthermore, the decision of the Ninth Circuit gives a stamp of judicial approval to the former EEOC notice system. If this Court does not address the issue of what notice triggers the ninety day period, the EEOC could readily resume its procedure of issuing separate notices of dismissal and formal notices of right to sue. This two step process gives a Title VII plaintiff the ability to extend indefinitely

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*In a footnote to its opinion which invites further uncertainty in EEOC practice, the Ninth Circuit recognized the possibility of such further regulatory changes by disclaiming any holding that "the right-to-sue letter is the only possible form of adequate notice." App. A-7, n.6.

the ninety day period. *See DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 311, *modified*, 520 F.2d 409 (2d Cir. 1975). The instant case exemplifies the problems caused by such a procedure. Plaintiff Missirlian decided not to file suit in federal court on the advice of competent counsel after receiving notice both of dismissal of her charge and of her right to file a private action. Instead, she waited over three years from the date of the original EEOC determination before filing suit. The EEOC regulations upheld by the Ninth Circuit allow a knowledgeable and informed plaintiff such as Missirlian to postpone indefinitely the issuance of a formal right to sue notice and thereby delay indefinitely the initiation of the ninety day period contained in Section 706(f)(1).

The Ninth Circuit summarily passed over this serious problem and relied upon the purported ability of defendants to assert the defense of laches as set forth in *Boone v. Mechanical Specialties Co.*, 609 F.2d 956 (9th Cir. 1979). App. A-7, n.6. This position is inconsistent with this Court's recent recognition that Title VII is "a statutory scheme in which Congress carefully prescribed a series of deadlines measured by numbers of days — rather than months or years." *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980).

Finally, the Ninth Circuit did not consider the current and unresolved issue of the time limitations within which the EEOC may reconsider its prior determinations.* App. A-8,

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*See, e.g., Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241 (5th Cir. 1980) in which the EEOC's reconsideration of a prior determination was upheld provided the decision to reconsider was made within the ninety-day period allowed by the initial notice of right to sue, unlike the six months which elapsed between the EEOC's original determination and its decision to reconsider in the instant case. *Accord, Trujillo v. General Electric Co.*, 621 F.2d 1084 (10th Cir. 1980). *Contra, Evans v. ITT Continental Baking Co.*, 21 FEP Cases 773 (W.D. Tenn. 1979).

n.7. Current regulations provide that the EEOC may reconsider its determinations, but provide no limitation on the period within which such action must be taken. 29 C.F.R. § 1601.21(b), (d) (1980). Setting a definite standard as to the requisite statutory notice to begin the running of the ninety day period gives this Court a sorely needed opportunity to provide guidance to the courts and the administrative agency as to the propriety of the EEOC's reconsideration procedures, particularly the time within which such action must be taken.

A ruling on whether receipt of notice of administrative dismissal triggers the ninety day statutory period within which a plaintiff must file a private civil action would allow this Court to determine whether the EEOC can expand that time limitation by an administrative decision to "reconsider" its prior determinations. In the present action, the EEOC's inordinate delay of over six months in issuing its notice of reconsideration of its initial determination of dismissal illustrates the uncertainties now caused by the lack of standards regarding the ninety day limitation of Section 706(f)(1).

**Conclusion.**

Only this Court can effectively resolve a conflict among the Circuits as to the notice required to begin the running of the ninety day jurisdictional period for Title VII suits, contained in Section 706(f)(1). Such a ruling can also resolve the current issue of the time limitations on the EEOC's ability to reconsider its own prior determinations. It is an established purpose of certiorari jurisdiction to resolve the kind of conflict here presented. A writ should be granted to resolve the conflict between the Courts of Appeals. Sup. Ct. Rule 17.1(a); Stern & Gressman, Supreme Court Practice, § 4.4, pp. 265-73 (1978).

For all of the above-stated reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated: February 1, 1982.

Respectfully submitted,

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# Appendix

## APPENDIX A.

### Opinion.

United States Court of Appeals for the Ninth Circuit.

Victoria Missirlian, Plaintiff-Appellant, v. Huntington Memorial Hospital, Defendant-Appellee. No. 79-3238. DC No. CV 78-4283-R.

Filed: November 4, 1981.

Appeal from the United States District Court For the Central District of California Manuel L. Real, District Judge, Presiding.

Argued and submitted: February 3, 1981.

BEFORE: FLETCHER and CANBY, Circuit Judges, and SOLOMON,* District Judge

FLETCHER, Circuit Judge:

Plaintiff Victoria Missirlian timely appeals from a summary judgment in favor of defendant Huntington Memorial Hospital denying her Title VII claim, 42 U.S.C. §§ 2000e to 2000e-17 (1976 and Supp. 1979), on the basis that the action was not timely filed in district court.[1] Jurisdiction is based on 28 U.S.C. 1291 (1976). We reverse.

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

[1]Requirements for filing a Title VII civil action are set forth in 42 U.S.C. § 2000e-5(f)(1)(1976) which provides in relevant part:

> If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . *shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought* against the respondent named in the charge (A) by the person claiming to be aggrieved . . . .

(emphasis added).

## FACTS

Until August 1, 1974 Missirlian worked as an accountant for Huntington Memorial Hospital. Missirlian alleges that during the time of her employment the hospital refused to promote her because of her sex and national origin. She also alleges that the hospital discharged her because she protested the denials of promotion. Missirlian filed a charge with the Equal Employment Opportunity Commission (EEOC) on August 5, 1974, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976 and Supp. 1979).

On June 3, 1975, the EEOC sent Missirlian a document designated "Determination" finding no merit to her charges. The Determination concluded:

> Should the Charging Party wish to pursue this matter further, she may do so by filing a private action in Federal District Court. (A separate attachment is enclosed to Charging Party with information regarding the procedure).

The "attachment" referred to was a letter to Missirlian which stated in full:

> This determination concludes the Commission's processing of the subject charge.
>
> Should you wish to pursue this matter further by instituting a *private* civil suit, please contact Ms. Barbara Schlei, at (213) 688-3414 and request a 90-day Notice of Right to Sue.

Missirlian did not contact Ms. Schlei. Instead, on the advice of an attorney, she informally asked the EEOC to reconsider her case.[2]

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[2]Missirlian had no formal right to request a reconsideration; she could only encourage the EEOC to reconsider her case on its own motion. 29 C.F.R. § 1601.19b(b)(1975).

On December 9, 1975, six months after its original Determination, the EEOC notified both Missirlian and the hospital of its "intent to reconsider" the case. In May of 1976, the EEOC issued a revised Determination finding that Missirlian had been denied promotion because of her sex, and that her discharge constituted reprisal and discrimination in violation of Title VII. On August 17, 1978, the EEOC notified Missirlian that its conciliation efforts had been unsuccessful, and sent her a Notice-of-Right-to-Sue letter.

Missirlian filed suit on November 7, 1978. The district court granted the hospital's motion for summary judgment, holding that (1) under Title VII, a plaintiff must bring suit in federal court within ninety days of notification either that the administrative processing of the charge is complete or that the plaintiff has a right to sue; (2) the initial Determination and accompanying letter constituted "effective statutory notice" of Missirlian's right to sue, triggering the ninety-day time period; and (3) the EEOC's reconsideration of the case and subsequent Notice-of-Right-to-Sue letter did not give Missirlian another opportunity to bring suit.

I

Section 706 of Title VII, 42 U.S.C. § 2000e-5(1976), requires the EEOC to investigate all charges of discrimination filed with it. If it finds no cause to believe that a charge is true, it "dismiss[es] the charge and promptly notif[ies] the person claiming to be aggrieved and the respondent of its action." *Id.* § 2000e-5(b). If it finds cause to believe that a charge is true, it attempts conciliation. *Id.* Section 706 further provides that if a charge is dismissed, or if the EEOC does not file suit and does not succeed in its conciliation efforts, the EEOC "shall so notify the person aggrieved and within ninety days after the giving of such

notice a civil action may be brought against the person named in the charge . . . ." *Id.* § 2000e-5(f)(1).

On its face, Title VII only requires the EEOC to notify the aggrieved party of the EEOC's decision to proceed no further. However, EEOC regulations in effect at the time Missirlian filed her charge with the agency provided that notification include "[a]dvice concerning [the aggrieved party's] rights to proceed in court under Section 706." 29 C.F.R. § 1601.25(a)(3)(1975). This advice was generally provided in the form of a "Notice of Right to Sue."[3] Missirlian was never provided with a formal "Notice of Right to Sue" in connection with the EEOC's original Determination; she was told that she could bring an action in federal court, and that she could "request a 90-day Notice of Right to Sue." The district court held that this information was sufficient to start the ninety-day clock on Missirlian's right to file a civil suit under Title VII.

In *Lynn v. Western Gillette, Inc.*, 564 F.2d 1282 (9th Cir. 1977), this court explained that "[i]f the private right of action [under Title VII] is to be effective, it is critical for the aggrieved party to know when the ninety-day period begins to run." *Id.* at 1285. In *Mahroom v. Hook*, 563 F.2d 1369, 1375 (9th Cir. 1977), *cert. denied*, 436 U.S. 904 (1978), we held that a Title VII plaintiff must be informed "that she has a right to sue and how much time she has in

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[3]Missirlian filed her complaint with the EEOC in 1974; the EEOC issued its original Determination in June, 1975 pursuant to its then existing regulations. These regulations established a two-tier notification system. *See Lynn v. Western Gillette, Inc.*, 564 F.2d 1282, 1285 (9th Cir. 1977) (description of two-tier system). Since Missirlian filed her complaint, the EEOC has abandoned this system in favor of a one-tier notice procedure. *See* 29 C.F.R. § 1601.28(b)(1980). Thus the scope of our holding in this case is limited to disputes arising under the two-tier notice system. The current EEOC notice system should not be affected because it is consistent with our decision here. *See id.* §§ 1601.28(b)(1)-(3), .28(e).

which to bring the suit.''[4] *See also Bradshaw v. Zoological Society of San Diego*, 569 F.2d 1066, 1067 (9th Cir. 1978) (citing *Lynn*) (ninety-day period starts to run from receipt of right-to-sue letter rather than receipt of earlier notice that EEOC could not effect conciliation). We derive from these cases that the ninety-day time limit on Title VII civil suits does not commence until the plaintiff receives notice of his or her right to sue and the date from which the time limit on this right starts to run.

The hospital argues that the rule of *Mahroom* and *Lynn* should not apply to Missirlian's case because those decisions involve notice subsequent to the EEOC's failure to effect conciliation whereas Missirlian originally received a Determination finding no reasonable cause. Essentially, the hospital argues that Title VII allows different forms of notice in conciliation-failure cases and no-reasonable-cause cases.

The Eighth Circuit's decision in *Shea v. City of St. Paul*, 601 F.2d 345 (1979), supports the hospital's position. In *Shea* the court concluded that where concilation fails, the ninety-day period does not commence until the plaintiff requests and receives notice of his or her right to file a civil suit but if the complainant ''is notified by the EEOC that the charge has been dismissed after the investigative stage, the 90-day period begins to run'' immediately. *Id.* at 349. In effect this rule establishes two different notice procedures. The first procedure applies to a conciliation failure where the notice-of-right-to-sue letter specifically informs the plaintiff when the ninety-day period starts. The other procedure applies to a no-reasonable-cause determination

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[4]The hospital attempts to distinguish this case because it involved the federal employment provisions of Title VII. The *Mahroom* court's holding regarding notification did not rely on this distinction, however. Instead, the court stated that it was ''giv[ing] effect to the intent and purpose of Congress in enacting Title VII.'' 563 F.2d at 1375.

8 where the Determination triggers the ninety-day period without explicit notice to the plaintiff of the commencement date.

We see no reason to require more of a Title VII plaintiff in the second situation. Both section 706(b), which deals with no-reasonable-cause determinations, 42 U.S.C. § 2000e-5(b)(1976), and section 706(f)(1), which deals with conciliation failures, *id.* § 2000e-5(f)(1), address only notice of the determination or the conciliation failure. We do not find in either section any indication of a congressional purpose to provide less information about civil suit procedures in the former situation than in the latter. The fact that the 1975 EEOC regulations contain separate provisions for notice under section 706(b) and section 706(f)(1) is irrelevant because neither regulation explicitly addresses notice of the time limit. *See* 29 C.F.R. §§ 1601.19b(b), .25(a)(1975).[5]

In our view, it is more compatible with the broad remedial purposes of Title VII and prior decisions of this circuit to require that a Title VII plaintiff receive a clear indication of when the ninety-day clock starts to run for filing a civil action. As we noted in *Mahroom v. Hook*, "[t]he Equal Employment Opportunity Act is a remedial statute to be liberally construed in favor of the victims of discrimination." 563 F.2d at 1375. To require a Title VII plaintiff to guess when the ninety-day period commences would be contrary to the purposes of the Act. We therefore reject the Eighth Circuit rule announced in *Shea*. Instead, we hold that a Title VII plaintiff who receives a no-reasonable-cause

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[5]Where the 1975 regulations address notice content, they indicate only that in both no-reasonable-cause determinations and conciliation failures, notice should include "[a]dvice concerning [the aggrieved party's] rights to proceed in court." 29 C.F.R. 1601.25(a)(3)(1975). Unlike the current regulations, *see* 29 C.F.R. § 1601.28(e)(1980), the 1975 regulations fail to specify the content of the "advice" or the notice.

determination or a notice of conciliation failure is entitled to a clear indication of when the ninety-day period commences.[6]

We conclude that the first letter Missirlian received from the EEOC did not provide a clear indication of when the ninety-day period commenced. The letter informed Missirlian that she had the right to bring a suit, but it did not tell her that she had ninety days in which to do so; it simply told her that she could request a document entitled "90-day Notice of Right to Sue." A lay person might think that he or she could bring a suit after receiving the first letter. However, a lay person more probably would think that he or she could not sue until ninety days after receiving a "Notice of Right to Sue." Not even a lawyer would be likely to think that suit had to be brought within ninety days of the receipt of the first letter. For these reasons, we hold that the original Determination and accompanying information sent to Missirlian did not start the ninety-day clock on her right to file a Title VII civil action.

## CONCLUSION

Since the EEOC's original Determination did not start the ninety-day period on Missirlian's right to file a civil action, and since the EEOC's decision to reconsider Missirlian's complaint was within its power, 29 C.F.R.

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[6]Because we focus on the elements of notice, we do not hold that the right-to-sue letter is the only possible form of adequate notice. For this reason, and because courts have the power to bar Title VII actions if the aggrieved party delays unnecessarily, *Boone v. Mechanical Specialities Co.*, 609 F.2d 956, 958-59 (9th Cir. 1979), the hospital's fear that a plaintiff could extend the ninety-day period indefinitely by refusing to request a right-to-sue letter is groundless.

§ 1601.19b(b)(1975).[7] Missirlian did not receive effective notice of her right to sue until she received the notice-of-right-to-sue letter after conciliation failed. Missirlian filed a civil action within ninety days of the receipt of this right-to-sue letter.

Accordingly, we reverse the grant of summary judgment to defendant Huntington Memorial Hospital and remand the case to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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[7]The hospital's argument that EEOC reconsideration of Missirlian's case could not extend the time for filing a civil action is premised on the erroneous assumption that the original Determination started the ninety-day clock. Because we hold that the original Determination did not start the clock, the hospital's argument is without merit.

## APPENDIX B.

**Findings of Fact and Conclusions of Law [Motion for Summary Judgment Filed Concurrently Herewith].**

United States District Court, Central District of California.

Victoria Massirlian, Plaintiff, v. Huntington Memorial Hospital, Defendant. No. 78-4283-R.

DATE: February 20, 1979.

TIME: 10:00 a.m.

COURTROOM: 14.

FILED: February 27, 1979.

Upon consideration of defendant's motion for summary judgment and the matter having been briefed and oral argument heard, the court hereby finds the following facts and states the following conclusions of law as follows:

### FINDINGS OF FACT

1. This is an action for back pay and injunctive relief for alleged employment discrimination. Plaintiff, Victoria Missirlian, is bringing suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

2. Plaintiff was hired as an accountant by defendant Huntington Memorial Hospital on September 8, 1970.

3. At the end of May, 1974, a white male was hired into the position of Manager of Financial Services. In this action, plaintiff alleges that she was entitled to this promotion and that defendant failed to promote her solely on account of her sex.

4. Plaintiff was discharged by the defendant on August 1, 1974. In this action, plaintiff alleges that this discharge was sex discrimination and a reprisal for her protest that she had not been promoted on account of her sex.

5. On August 5, 1974, plaintiff filed a charge with the Equal Employment Opportunity Commission alleging that defendant violated her rights under Title VII of the Civil Rights Act of 1964. On January 29, 1975, plaintiff amended her EEOC charge. In this EEOC charge, plaintiff alleged illegal national origin discrimination, as well as sex discrimination and reprisal.

6. There are no genuine issues as to the following material facts.

7. On June 3, 1975, the Equal Employment Opportunity Commission issued a Determination as to the merits of the plaintiff's charge. Pursuant to 29 C.F.R. § 1601.19b(d), the Commission found that there was no reasonable cause to believe any of plaintiff's allegations of sex discrimination, national origin discrimination, or illegal reprisal. The EEOC determination also stated:

> "This determination concludes the Commission's processing of the subject charge. Should the Charging Party wish to pursue this matter further, she may do so by filing a private action in Federal District Court. (A separate attachment is enclosed to charging party with information regarding the procedure.)"

8. Attached to the Letter of Determination was a separate letter from Lorenzo Traylor, Director of the Los Angeles District Office, also dated June 3, 1975, which advised plaintiff that she could contact an attorney with the EEOC and request a "90-day Notice of Right to Sue" form.

9. Plaintiff received this Determination by "Certified Mail Return Receipt Requested" on June 5, 1975.

10. After receipt of the June 3 letter, plaintiff consulted with an attorney. According to plaintiff, she decided not to sue because her attorney advised her not to sue due to the cost she would incur. Plaintiff made no effort to file an

action in federal court under Title VII until this action was filed in November, 1978.

11. On December 9, 1975, the EEOC sent letters to the Hospital and plaintiff stating that the Commission intended to reconsider its determination with respect to plaintiff's charge pursuant to Section 1601.19b(d) of the Commission's procedural rules. This notice to the employer was received a full six months after the Commission issued its original determination finding no reasonable cause to believe the charge.

12. On May 28, 1976, the EEOC issued a revised determination finding (i) that the plaintiff had not been promoted due to her sex; and (ii) that plaintiff's discharge constituted sex discrimination and reprisal in violation of Title VII. The EEOC reaffirmed its determination that there was no reasonable cause to believe the charge of national origin discrimination.

13. On August 17, 1978, the EEOC notified plaintiff that they failed to achieve concilation, and that plaintiff could sue in federal district court.

14. On November 7, 1978, plaintiff filed this action in this court.

## CONCLUSIONS OF LAW

1. Section 706(f) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1) requires that an individual who has filed a timely charge with the EEOC must file a complaint in federal district court within ninety (90) days after receiving notice from the EEOC of either the completion of administrative processing of the charge or of the prospective plaintiff's right to sue. This requirement is an essential prerequisite to the subject matter jurisdiction of this court. *Cleveland v. Douglas Aircraft Company* (9th

Cir. 1975), 509 F.2d 1027; *Wong v. The Bon Marche* (9th Cir. 1975), 508 F.2d 1249.

2. On June 5, 1975, plaintiff received effective statutory notice of her right to sue. *DeMatteis v. Eastman Kodak Company* (2d Cir. 1975), 511 F.2d 306, *modified*, 520 F.2d 405 (1975). Plaintiff was required under Section 706(f)(1) of Title VII to file a complaint in federal court by September 5, 1975, ninety (90) days after her receipt of the original determination and statutory notice of her right to sue. *Cleveland v. Douglas Aircraft Company* (9th Cir. 1975), 509 F.2d 1027.

3. The revision of the substance of the original determination by the EEOC is a legal nullity. Plaintiff's single opportunity to bring an action in the United States District Court expired on September 5, 1975, and the EEOC is without power to enlarge the subject matter jurisdiction of this court by issuing a new determination or a second right to sue notice. *Cleveland v. Douglas Aircraft Co., supra.*

4. Plaintiff's action is dismissed with prejudice.

DATED: July 27, 1979

/s/ Manuel L. Real
UNITED STATES DISTRICT JUDGE

**Summary Judgment.**

United States District Court, Central District of California.

Victoria Missirlian, Plaintiff, v. Huntington Memorial Hospital, Defendant. No. 78 4283 R.

Filed: February 27, 1979.

This action came on for hearing on defendant's motion for summary judgment before the Court, the Honorable Manuel L. Real, United States District Judge presiding. The issues having been duly heard, good cause appearing, and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action be dismissed, and that each party bear its costs of action:

DATED: Feb. 27, 1979.

/s/ Manuel L. Real
Judge
United States District Court

## APPENDIX C.

**Determination of Equal Employment Opportunity Commission Dated June 3, 1975 and Attachment.**

[Letterhead]

CERTIFIED MAIL
RETURN RECEIPT
REQUESTED

IN REPLY REFER TO:

Charge No. TLA5 0317

Victoria Missirlian
1339 La Loma Road
Pasadena, CA 91105

Charging Party

Huntington Memorial Hospital
100 Congress Street
Pasadena, CA 91105
Attn: Mr. James Riedel

Respondent

DETERMINATION

Under the authority vested in me by Section 1601.19b(d) of the Commission's Procedural Rules, 37 Fed. Reg. 20165 (September 27, 1972), I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII and the timeliness, deferral, and all other jurisdictional requirements have been met. No final findings have been issued by the State Agency.

Charging Party alleges that she was discriminated against by Respondent because of her sex, female, in that she was hired as an accountant, an hourly position, at a rate of pay lower than the one quoted to her by an employment agency; in that she was denied a promotion to Manager of Financial Services, an exempt position; and in that she was terminated for having protested Respondent's refusal to promote her. Charging Party further alleges that she might also have been

denied the promotion because of her national origin, Armenian, in that she has an accent.

With regard to the issue of wages at the time of hire, the Commission finds that this allegation was untimely filed in that the charge was not received within one hundred and eighty days after the alleged unlawful employment practice occurred as stipulated by Section 706(e) of Title VII of the Civil Rights Act of 1964, as amended. This allegation is therefore dismissed for lack of jurisdiction.

Respondent denies the remaining allegations and contends that Charging Party was not promoted because she had difficulty in communicating technical, detailed matters to other employes and she would at times become upset with some employees when they did not quickly understand her explanation of an accounting situation. Respondent added that this new job required a great deal of communication including some training for administrators, department heads and division heads. Respondent added that Charging Party's communication problems had nothing to do with her accent or any language problem. Respondent acknowledges that Charging Party had protested its decision not to promote her and that she believed his decision "was due to her foreign accent and the fact that she was a woman", but that Charging Party was not discharged because of her protests but because of her uncooperative attitude toward her supervisor.

The following facts are undisputed: that Charging Party was hired as an accountant on September 8, 1970; that an Anglo male was hired into a new position, Manager of Financial Services, on April 8, 1974; that this new position was expanded to include supervision of Charging Party; that this male was promoted to Manager of General Accounting shortly after being hired; that another Anglo male was hired into the Manager of Financial Services position at the end

of May 1974; and that Charging Party was discharged August 1, 1974.

In considering whether Charging Party's accent may have been a consideration in Respondent's decision not to promote her, the investigation revealed that the Manager of General Accounting prior to the Anglo male mentioned above was a Philipino male with a very heavy accent. The record showed that he received very good evaluations and at least one promotion. Accordingly, the Commission does not find that there is reasonable cause to believe that Charging Party's accent was a factor in being denied a promotion.

With regard to the allegation that Charging Party was denied the promotion because of her sex, the investigation revealed testimony which, while favorable to Charging Party's competence, supported Respondent's contention that there were some communication problems and that she may not have been particularly well suited to the training aspects of the Manager of Financial Services position.

There were no promotions in the department from hourly to exempt in 1974, however, the record did reveal that two hourly employees were given titular promotions to exempt positions in March 1974 but were kept on the hourly payroll until April 1975 because of overtime considerations. The record showed that one of these two people is female and that this change was effected by the same person responsible for not promoting Charging Party.

Accordingly, the Commission does not find that there is sufficient evidence to support Charging Party's allegation that she was not promoted because of her sex.

With regard to the issue of termination, Charging Party's supervisor testified that he terminated her because he felt she was resisting his supervision through her attitude of rudeness and uncooperativeness in assisting him to learn the

specifics of her bookkeeping procedures as well as the general procedures and organization of Respondent. It is undisputed that on July 30, 1974, this supervisor planned on issuing Charging Party a formal warning notice, that she left work early because she was ill, that she called in sick on July 31st, and that she was terminated the next day.

There was documentation from three conferences Charging Party had in early June and July with two Respondent Personnel Officials stating that she protested not being promoted and that she said she "would not help [her new supervisor] in terms of giving him information or showing him what she does". There was additional documentation from another Respondent Official showing that prior to leaving work on July 30th Charging Party told him that "she could not 'teach' her supervisor . . . . and (that) it was not fair that she be required to do so." Charging Party denies that she ever refused to cooperate with or "teach" her supervisor. The investigation did reveal, however, that on July 31st Charging Party called Respondent Personnel Department to report that she was out sick. The personnel clerk who took the call stated that she told Charging Party to call her supervisor directly and that Charging Party replied that "she was not sure any longer who was her supervisor and that she did not wish to make such a call". This personnel clerk relayed this information to the head of personnel and to Charging Party's supervisor. Charging Party's supervisor stated that he then felt her cooperation and attitude was not going to improve and decided to terminate her. The investigation did not reveal a situation similar to Charging Party's.

As to whether Charging Party's discharge was retaliation against her for having protested acts made unlawful under Title VII of the Civil Rights Act of 1964, as amended, — namely her belief that she was not promoted because of her

sex and national origin — the investigation showed that while Charging Party's position of accountant was not filled after she left, a female clerical was placed under Charging Party's former supervisor. The record showed that this woman, who had not made any protestations, received a final warning notice from this supervisor in December 1974. This warning was in part concerned with her "attitude problem" and threatened termination. The investigation also showed that this woman is still employed under Respondent supervisor in question. Based on the foregoing, it does not appear that Respondent Supervisor's treatment of Charging Party was so unique as to be interpreted as retaliation. Accordingly, the Commission does not find evidence to believe that Respondent discharged Charging Party in retaliation for her having protested Respondent's refusal to promote her because of her sex and national origin.

This determination concludes the Commission's processing of the subject charge. Should the Charging Party wish to pursue this matter further, she may do so by filing a private action in Federal District Court. (A separate attachment is enclosed to Charging Party with information regarding the procedure).

On behalf of the Commission:

/s/ Lorenzo H. Traylor
LORENZO H. TRAYLOR, Director
Los Angeles District Office

[Letterhead]

IN REPLY REFER TO:
TLA5 0317

Ms. Victoria Missirlian
1339 La Loma Road
Pasadena, CA 91105

Dear Ms. Missirlian:

This Determination concludes the Commission's processing of the subject charge.

Should you wish to pursue this matter further by instituting a *private* civil suit, please contact Ms. Barbara Schlei, at (213) 688-3414 and request a 90-day Notice of Right to Sue.

Sincerely,

/s/ Lorenzo H. Traylor
LORENZO H. TRAYLOR
Director
Los Angeles District Office

# Opposition

Office - Supreme Court, U.S.
FILED
MAR 9 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1446

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

HUNTINGTON MEMORIAL HOSPITAL,

Petitioner,

vs.

VICTORIA MISSIRLIAN,

Respondent.

---

**RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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695 Town Center Drive
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Attorney for Respondent
VICTORIA MISSIRLIAN

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IN THE

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October Term, 1981

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HUNTINGTON MEMORIAL HOSPITAL,

Petitioner,

vs.

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Respondent.

---

**RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.**

---

Respondent VICTORIA MISSIRLIAN opposes Petitioner HUNTINGTON MEMORIAL HOSPITAL'S Petition for a Writ of Certiorari in review of the judgment and opinion of the United States Court of Appeals for the Ninth

Circuit entered in the above-entitled case on November 4, 1981.

**STATEMENT OF CASE.**

Respondent VICTORIA MISSIRLIAN originally brought this action in the United States District Court, Central District of California, seeking back pay and injunctive relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e-17 (1976 and Supp. 1979).

VICTORIA MISSIRLIAN alleged in her complaint that during the period of her employment, from 1970 until August 1, 1974, four openings for a managerial position occurred on at least five occasions, and each time the position was filled by a male. Although VICTORIA MISSIRLIAN had a degree in accounting and had spent more than four years working as an accountant for the HUNTINGTON MEMORIAL HOSPITAL,

whenever managerial positions were available, they were given to males with less experience than VICTORIA MISSIRLIAN, notwithstanding the fact that she was capable to, and did, perform most of the required duties of these positions. At the time of the most recent vacancy, the hospital selected a less qualified male to fill the position in question. VICTORIA MISSIRLIAN thereupon protested to the hospital that she had not been promoted due to the fact that she is a woman, at which time reprisal action was taken against her, including discharge from her job. It is further alleged that this conduct on the part of the hospital was part of a policy of discrimination by excluding women from managerial jobs and higher paying positions solely on account of sex.

Four days after being discharged, on

August 5, 1974, VICTORIA MISSIRLIAN filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging violations of Title VII of the Civil Rights Act of 1964, as above outlined.

On June 3, 1975, the EEOC sent VICTORIA MISSIRLIAN a document designated "Determination", finding no merit to her charges.The Determination concluded:

> Should the charging party wish to pursue this matter further, she may do so by filing a private action in Federal District Court. (A separate attachment is enclosed to Charging Party with information regarding the procedure).

The "attachment" referred to is a letter to VICTORIA MISSIRLIAN which stated in full:

> This determination concludes the Commission's processing of the subject charge.
>
> Should you wish to pursue this matter further by instituting a private civil suit, please contact Ms. Barbara Schlei, at (213) 688-3414 and request a 90-day Notice of Right to Sue.

VICTORIA MISSIRLIAN did not contact Ms. Schlei. Instead, she consulted with an attorney who advised her to informally ask the EEOC to reconsider her case.

On December 9, 1975, six months after its original Determination, the EEOC notified VICTORIA MISSIRLIAN and the hospital of its intention to reconsider the case. During May of 1976, the EEOC issued a revised Determination, finding that VICTORIA MISSIRLIAN had in fact been denied promotion because of her sex and that her discharge did constitute reprisal and discrimination in violation of Title VII. On August 17, 1978, the EEOC notified VICTORIA MISSIRLIAN that its conciliation efforts had been unsuccessful and sent her a Notice-of-Right-To-Sue letter.

The District Court dismissed VICTORIA MISSIRLIAN'S complaint on the hospital's

Motion for Summary Judgment on the grounds that (1) Section 706(f)(1) requires a Title VII plaintiff to file a complaint in Federal Court within 90 days of receiving notification from the EEOC either that the administrative processing of the charges is complete or that the plaintiff has a right to sue; (2) the initial Determination dismissing plaintiff's charge constituted effective statutory notice of her right to sue and that plaintiff was therefore required to file a complaint in the Federal Court within 90 days of receipt thereof; and (3) the EEOC'S revised Determination was a legal nulity due to the expiration of the 90 day period.

The Ninth Circuit, per Justice Fletcher, held that under the previous two-tier notification system employed by the EEOC, the original "Determination" did not start

the 90 day period on VICTORIA MISSIRLIAN'S right to file a civil action, and since the EEOC'S decision to reconsider VICTORIA MISSIRLIAN'S complaint was within its power, 29 C.F.R. Section 1601.19(b) (1975), VICTORIA MISSIRLIAN did not receive effective notice of her right to sue until she received the Notice-of-Right-To-Sue letter after conciliation failed. Since VICTORIA MISSIRLIAN filed a civil actin within 90 days of the receipt of this Right-To-Sue letter, the grant of summary judgment to defendant HUNTINGTON MEMORIAL HOSPITAL was reversed and the case was remanded to the District Court.

**REASONS FOR DENYING THE PETITION.**

Petitioner argues that this Court should issue a Writ of Certiorari for two basic reasons:

(1) That the decision of the Ninth Circuit is in direct conflict with the Eighth, Third and Second Circuit Courts of

Appeals on a fundamental jurisdictional issue of Title VII law: What notice from the EEOC triggers the 90-day period within which a private plaintiff must sue in Federal Court; and

(2) That the Ninth Circuit did not consider the current and unresolved issue of the time limitations within which the EEOC may reconsider its prior determinations; arguing that setting a definite standard as to the requisite statutory notice to begin the running of the 90 day period gives this Court a sorely needed opportunity to provide guidance to the courts and the administrative agency as to the propriety of the EEOC's reconsideration procedures, particularly the time within which such actions must be taken.

In the first instance, the question as to when the 90 day limitation period commences is moot because the EEOC has abandoned the two-tier notification

system, and the Petitioner is asking this Court to render an advisory opinion.

In the second instance, a ruling from this Court is unnecessary because the courts and the EEOC already have guidance as to the propriety of the EEOC's reconsideration procedures, including the time within which such actions must be taken.

In the Ninth Circuit's opinion, in Footnote 3, the Court observed:

> Missirlian filed her complaint with the EEOC in 1974; the EEOC issued its original Determination in June, 1975 pursuant to its then existing regulations. These regulations established a two-tier notification system. See Lynn v. Western Gillette, Inc., 564 F.2d 1282, 1285 (9th Cir. 1977) (description of two-tier system). Since Missirlian filed her complaint, the EEOC has abandoned this system in favor of a one-tier notice procedure. See 29 C.F.R. Section 1601.28(b) (1980). Thus, the scope of our holding in this case is limited to disputes arising under the two-tier notice system. The current EEOC notice system should not be affected because it is consistent with our decision here. See id. Sections 1601.28(b)(1)-(3), .28(e).

The so-called conflict between the Circuits relied upon by Petitioner is based

upon the old two-tier notification system. Since this system has been abandoned and replaced with a one-tier system, the issue as to when the 90-day limitations period commences, upon receipt of the first notification or upon receipt of the second notification, is no longer an issue which must be resolved by this Court. It is moot, and this Court "does not sit to decide arguments after events have put them to rest". Doremus v. Board of Education 342 U.S. 429 (1952).

Petitioner recognizes this fact, but argues that current regulations are subject to change, and that the EEOC has routinely modified and amended its procedural regulations. Therefore, Petitioner reasons that a definite statement by this Court concerning what notice is sufficient to begin the running of the 90 day period would dispell the uncertainty surrounding this issue

because the EEOC would be required to follow the standard in all pertinent regulations promulgated in the future.

This Court has clearly held that Article III, of Section 2, of the United States Constitution, limits the jurisdiction of all Federal Courts to "cases and controversies." This Court has construed this to require a real and substantial dispute, affecting the legal rights and obligations of parties having adverse interests, and permitting specific relief through a conclusive judicial decree. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937). Pursuant to this limitation, this Court has clearly held that it will not render advisory opinions -- i.e., opinions based on assumed or hypothetical facts which are not part of an existing, actual controversy. Muskrat v. United States, 219 U.S. 346 (1911).

By arguing that a statement from this Court is necessary in order to insure that the EEOC will not change its regulations in the future reinstating a two-tier notification system, Petitioner is requesting the Court to render an opinion based on assumed or hypothetical facts -- i.e., what the EEOC may or may not do.

Concerning Petitioner's second argument, the Ninth Circuit concluded that since the EEOC's original determination did not start the 90 day period on VICTORIA MISSIRLIAN'S right to file a civil action, and since the EEOC's decision to reconsider her complaint was within its power, 29 C.F.R. Section 1601, 19(b)(1975), VICTORIA MISSIRLIAN did not receive effective notice of her right to sue until she received the Notice of Right to Sue letter after conciliation failed. In so holding, the Court noted in Footnote 7:

> The hospital's argument that EEOC reconsideration of Missirlian's case could not extend the time for filing a civil action is premised on the erroneous assumption that the original Determination started the 90-day clock. Because we hold that the original Determination did not start the clock, the hospital's argument is without merit.

This is consistent with the decision in Lynn v. Western Gillette, Inc., supra, 564 F.2d at 1287, wherein it was held that the EEOC's administrative jurisdiction did not end until after the Notice of Right to Sue had been issued.

Moreover, a case cited by Petitioner, Shea v. City of St. Paul, 601 F.2d 345 (8th Cir. 1979), provides the guidelines under these factual circumstances, which Petitioner claims do not exist.

That is, Shea dealt with a factual situation in which the plaintiff therein was issued a Determination by the EEOC advising her that she could request a Right-to-Sue letter. Within 90 days thereafter, Ms. Shea requested the EEOC to

reopen its investigation. This the EEOC declined to do, and by letter from the District Director, she was so notified.

In Footnote 5 of the Shea opinion, the Eighth Circuit noted that where the EEOC entertains a request for a reconsideration of its determination, the Commission's administrative remedies are not completed until the review of the Determination, Tuft v. McDonell Douglas Corp., 517 F.2d 1301, 1309 (8th Cir. 1975).

As previously noted, the original Determination was issued by the EEOC on June 3, 1975. The records and briefs below clearly indicate that VICTORIA MISSIRLIAN requested the District Director of EEOC to reopen her case during June or July of 1975, well within the 90 day limitation period.

Therefore, based upon the rational of Shea and Tuft, supra, the EEOC's administrative procedures were not completed,

the result of which procedures was to reconsider the case.

Moreover, the real issue in this regard surrounds the abandoned two-tier notification system. Since the Petitioner's argument that EEOC reconsideration of VICTORIA MISSIRLIAN'S case could not extend the time for filing a civil action is premised on the two-tier notification system, EEOC abandonment of this system also renders this issue moot.

**CONCLUSION.**

There is no conflict among the Circuits which this Court must resolve because the two-tier notification procedural system under which this case arose is no longer used. This issue is moot and this Court should not render an advisory opinion as to what the law would be if the EEOC should at some time in the future reinstitute the two-tier system. Moreover, under the facts

of this case there is no issue of the time limitations on the EEOC's ability to reconsider its own determinations, and even if the issue did exist, it has been rendered moot.

For all the above-stated reasons, a Writ of Certiorari should not issue to review the judgment and opinion of the Ninth Circuit.

Dated: March 5, 1982

Respectfully Submitted,

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